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IN THE

Supreme Court of the United States

Term, 1971

No. .....

JAMES BUTTS and JOHN S. GIANAKOS,

Petitioners,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Cases No. 35186 and No. 35197

The Petitioners, James Butts and John C. Gianakos, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case.

OPINION BELOW

The only opinion rendered by the District Court was on certain pre-trial motions including a motion for change of venue; this opinion not reported is set forth in

Appendix Exhibit A to this Petition. No opinion was rendered by the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1971. Appendix Exhibit B. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the motion for change of venue should have been granted because the government was directly and solely responsible for the publication of the objectionable and damaging pre-trial publicity complained of by the Petitioners.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

The Sixth Amendment to the United States Constitution provides:

> **In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.**

Rule 21(a) of the Federal Rules of Criminal Procedure provides:

> **For prejudice in the district or division. The Court upon motion of the defendant shall transfer the proceedings as to him to another district or division if the Court is satisfied that there exists in the district**

or division where the prosecution is pending, so great a prejudice against the defendant that he cannot obtain a fair trial in that district or division.

STATEMENT OF THE CASE

On January 16, 1970, the Petitioners were indicted with five others in the United States District Court for the Southern District of New York for violation of 18 U.S.C. Section 371, which in pertinent part provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

The case involved a valuable oil painting purportedly stolen from the Pan American Terminal in the John F. Kennedy Airport in New York.

On February 10, 1970, United States Attorney General John N. Mitchell made a speech at New York City's Waldorf Astoria Hotel Appendix Exhibit C in which he was quoted as stating, inter alia, that airport trucking at a "rather large airport" was apparently almost entirely mob controlled. The television and news media reported the airport to be the John F. Kennedy Airport in New York City and it became a cause celebre in the New York newspapers. (Appendix Exhibit D, E, F, G, H & I)

On February 16, 1970, petitioners filed motion for change of venue based on this pre-trial publicity and motion was denied on March 25, 1970 and trial began April 28, 1970 and Motion for change of venue was renewed and again denied.

REASONS FOR GRANTING THE WRIT

This case raises a question which has never been squarely decided by this Court, and which has caused concern to many of the lower courts through the years. There is a need for certain guidelines to be established, particularly for the courts in large metropolitan areas which have extensive television and newspaper coverage.

In the United States v. Bonanno (1959, DCNY) 177 F. Supp. 106, at 122, the Court stated:

> A study of the cases dealing with the problem of pre-trial publicity indicates that four main factors should be considered in deciding if relief of some kind should be granted at this stage of the proceedings. First, it is necessary that the publicity be recent, widespread and highly damaging to the defendants. Second, it is an important consideration whether the government was responsible for the publication of the objectionable material, or if it emanated from independent sources. This factor is especially significant in regard to the third factor, the inconvenience to the government and the administration to the government and the administration of justice of a change of venue or continuance. The government can hardly be heard to complain of inconvenience if it was responsible for the dissemination of damaging material. In fact, governmental complicity was almost singularly dispositive in the leading case in which a trial judge's discretion was reversed, see *Delaney v. United States*, 1 Cir., 1952, 199 F.2d 107, though the publicity in that case was particularly virulent and was concentrated on the eve of trial. Last, it must be considered whether a substantially better panel can be sworn at another time or place.

In *People v. Landecki* (1965) 22 App Div 2d 636, 258 NYS2d 115, where the pretrial publicity was found to be such as to require that the defendant, indicted for murder, be granted a change of venue, the court

> stated that the active participation by not only the law enforcement officers but also the district attorney in the release of the publicity had the effect of poisoning the fountain of justice before it began to flow.
>
> It has been explicitly stated that a court which has been called upon to determine whether pretrial publicity in a criminal case has been such as to jeopardize a defendant's right to a fair and impartial trial thus necessitating a change of venue, may properly consider the connection of the police prosecution with the release of the publicity complained of.

The petitioners were denied a fair and impartial trial by failure of the Court below to grant their Motion for a Change of Venue.

Venue in a criminal case is a matter of constitutional right and not merely a matter of formal legal procedure. *Holdridge v. U.S.*, (1960) CA 8 Nebraska 282 F.2d 302.

Although the Sixth Amendment guarantees a jury of the district and not a trial in the district, nevertheless the cases seem to construe it as guaranteeing a trial in the district in which the crime was committed. *Burton v. U.S.*, (1906) 202 US 344, 381, 50 L. Ed. 1057, 26 S. Ct. 688. *Salinger v. Loisel*, (1924) 265 US 224, 233, 68 L. Ed. 989, 44 S. Ct. 519. *U.S. v. Johnson*, (1944) 323 US 273, 275, 89 L Ed. 236, 65 S. Ct. 249. *U.S. v. Polin*, (1963) CA 3 NJ 323 F.2d 549.

On February 10, 1970, the United States Attorney General, John N. Mitchell, speaking in the City of New York, appeared on television and was quoted by other forms of the news media announcing that an International Airport in the New York area was in control of racketeers.

The Supreme Court of the United States, speaking through Mr. Justice Clark in the case of *Sheppard v. Maxwell*, decided June 6, 1966 and reported in 384 US 333,

86 S. Ct. 1507, at page 362, "* * * but where there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. * * *" [Emphasis supplied]

In *United States v. Malinsky*, 20 FRD 360 at 362, the United States District Court for the Southern District of New York decided that question of a request for Change of Venue by citing thirteen salient points.

Point 4. "Neither the Department of Justice nor the United States Attorney's Office for the Southern District of New York has been responsible for or had any connection with the release of the publicity complained of.

Point 11. "One of the items, a cartoon does not contain the name of any union or person * * *"

In the instant case the publicity complained of arose out of the speech by Attorney General Mitchell, and the ensuing publicity was kept alive in the New York press which in both reportorial service and by editorial, kept the matter before the public in the City of New York.

Rule 21 (b) Federal Rules of Criminal Procedure states:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from the bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

The interests of justice may better be served if any undue pretrial publicity attaches to the case or to matters

of *similar import*. [Emphasis supplied] See *Sheppard v. Maxwell*, (supra).

Under the above stated rule, an offense committed in more than one district may in the interest of justice be transferred from the district in which the offense was committed. *Hesse v. United States*, (1960 D.C. N.Y.) 187 F. Supp. 375.

Such venue may be laid in any district in which an overt act in furtherance of the conspiracy was committed as well as the place of agreement. *Hyde v. United States*, (1912) 225 U.S. 347, 56 L. Ed. 1114, 32 S. Ct. 793.

Mr. Justice Jackson's verbiage in *Krulewitch v. United States*, (1949) 336 U.S. 440, 452, 453:

> "• • • Of course, it is for prosecutors rather than Courts to determine when to use a scatter gun to bring down the defendant, but there are procedural advantages from using it which add to the danger of unguarded extension of the concept.
>
> An accused under the Sixth Amendment has the right to a trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' The leverage of a conspiracy charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where anyone of the conspirators did any one of the acts, however innocent, intended to accomplish its object. The Government may, and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial, and by itself innocent, act in the chosen district. • • •
>
> When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facia the conspiracy

and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control as a practical matter the accused is confronted with a hodge podge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words the conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive effects that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction (citing *Shidmore v. Baltimore and Ohio R. Co.* (CCA 2nd NY) 167 F.2d 54), Cf. *Blumenthal v. U. S.*, 332 US 539, 92 L Ed. 154, 68 S. Ct. 248.

The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant. The hazard from loose rules of evidence is aggravated where the Government institutes mass trials. Moreover, in federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices, as there are in many jurisdictions, and the most comfort a defendant can expect is that the Court can be induced to follow the 'better practice' and caution the jury against 'too much reliance upon the testimony of accomplices'. (Citing *Cominetti v. United States*, 242 US 470, 495, 61 L Ed. 442, 37 S. Ct. 192, LRA 1917 F 502, Ann Cas 1917 B 1168.

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent he is taken to admit it, and if, as often happens, co-defendants can be prodded into accusing or contradicting each other,

> they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate * * *".

Venue statutes are liberally construed so as to minimize inconvenience to defendants. Rule 21 (b) implements this policy and will allow selection of the place where the case is to be tried as the interest of justice indicates. *United States v. Amador Casavas*, (1964) D.C. District of Columbia 233 F. Supp. 1001.

The United States Attorney General has added a spectacular aura to the conditions surrounding the John F. Kennedy International Airport by his speech of February 10, 1970, which was distorted out of proportion by the various news media.

The Honorable Court below denied the Petitioners motion out of hand. The motion was renewed during trial and was denied by the trial judge.

SECOND QUESTION PRESENTED

The Petitioner James Butts raises the question of severance of defendants and a separate trial not raised either in the District Court or the Court of Appeals by the Petitioner Giannakos.

Whether the motion for a severance and a separate trial should have been granted because of the "omnibus" nature of the trial and the reasonable possibility of prejudice arising from trial of multiple defendants.

The Petitioner Butts was prejudiced in his trial when the Court below refused to grant him a severance and a separate trial.

The Honorable Judge in hearing the motion of the Petitioner James Butts for a severance of defendants and a

separate trial, denied said motion out of hand (Appendix Exhibit A). This motion was renewed during trial and the trial judge denied the motion and ordered the trial continued.

It is interesting to note the dissent of Judge Jerome Frank, in the 1943 case of *United States v. Liss*, CA 2, NY 137 F. 2d 995, 1001 to 1004; cert denied, 320 U.S. 773, 8 L Ed. 462, 463; 64 S. Ct. 78, 79:

> "More ought to be done I think to prevent prosecutors from the excuse of need for "expedition" to use unnecessarily conspiracy trials in which large numbers of defendants are herded into one suit, instead of bringing several actions. The trial dockets are not so congested as to compel such omnibus trials. Any district can do much to meet this situation by exercising on his own, motion to compel severance."

There is much that can be considered from Judge Frank's dissent. This teaching though not the majority struck at what inherently is the practice of prosecuting agencies in staging trials of multiple defendants in conspiracy trials. It appears that irreparable damage is done by testimony given by witnesses in the weaving the skein of evidence, necessary in such trials, and even the most explicit of instructions given to the jury by the trial judge are ignored by juries, or at best discarded by them, as not being germane to the guilt or innocence of a particular defendant. They have the feeling that all defendants should be tarred with the same brush.

In the instant case, the Petitioner Butts was inhibited in his defense to such a degree as to amount to the denial of a fair trial.

Rule 14 of the Federal Rules of Criminal Procedure states:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

The Petitioner, James Butts, was never in the Southern District of New York. He was not acquainted with a majority of the conspirators.

The ultimate question reached is whether under all circumstances of the particular case, it is as a practical matter, that a defendant can be protected from the testimony of a co-defendant or an alleged co-conspirator and of course the admonitory instructions given by the court and to collate and apprise the independent evidence against each defendant solely upon the defendant's own acts. *United States v. Haynes*, (1948) DC Pa. CA 3, 173 F. 2d 223, also reported in 81 F. Supp. 63, 70.

The Petitioner James Butts, contends that a fair and impartial trial was not obtained because a severance was not granted.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

The petitioners application for Writ of Certiorari to the United States Court of Appeals for the Second Certiorari should be granted.

Respectfully submitted,

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Baltimore, Maryland 21221
(301) 752-2000 x2333

Attorney for Petitioners.

APPENDIX

EXHIBIT A

MEMORANDUM OPINION OF DISTRICT JUDGE THOMAS F. MURPHY ON MOTIONS

MURPHY, D. J.

Defendants Butts, Gianakos and Jacobsen have severally moved for the following relief: Butts has moved for a bill of particulars, discovery and inspection, an order to inspect the grand jury minutes, an order dismissing the indictment, an order changing the venue to the United States District Court for the District of Maryland and for a severance; defendant Gianakos has also moved for a change of venue to the District Court of Maryland; and, defendant Jacobsen has moved for a severance.

The motions for a change of venue are each denied, as are the motions for a severance.

Butt's motion to dismiss the indictment is denied, and his motions for discovery and inspection and for a bill of particulars are disposed of as follows. He is entitled to inspect and discover (I&D) (a) any admissions or statements that he made to any agents of the United States either at the time of or after his arrest, no matter whether the government intends to use such statement or admission as part of its direct case at trial; (b) also, pursuant to the government's consent, any and all papers belonging to defendant Butts, either taken from him at the time of his arrest or obtained by seizure or process from others and, as consented to by the government, and (c) any information obtained by wiretapping or any electronic device involving the defendant Butts. In all other respects

his motion for discovery and inspection is denied. With reference to Butts' motion for a bill of particulars (B/P) the government must state (a) the date and approximate time defendant Butts was arrested and (b) the names of the arresting officers and (c) the date "when the interstate and foreign shipment of freight" was concluded. In all other respects his motion for a bill of particulars is denied.

These are orders. No settlements are necessary.

/S/ THOMAS F. MURPHY,
U.S.D.J.

Dated, New York, N.Y., March 25, 1970.

EXHIBIT B

UNITED STATES COURT OF APPEALS
for the
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of January one thousand nine hundred and seventy-one.

Present:

HON J. EDWARD LUMBARD,
Chief Judge

HON. LEONARD P. MOORE,

HON. J. JOSEPH SMITH,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Louis Capellupo, et al.,
Defendants.

John C. Gismakos, Edward Jacobsen, James Butts,
Defendants-Appellants,

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

EXHIBIT C

Excerpts from United States Attorney General John N. Mitchell's speech at the Waldorf-Astoria on February 10, 1970, as reported in 6 Cr. L.R. 2357, on February 18, 1970.

ATTORNEY GENERAL DISCUSSES MOB INFILTRATION OF BUSINESS

Attorney General Mitchell refers to mob takeovers in airport trucking and securities thefts.

More and more, organized crime is trying to muscle in on legitimate business activities, Attorney General John N. Mitchell told the Bond Club last week in a speech at New York City's Waldorf Astoria Hotel.

As an example, the Attorney General mentioned "a rather large airport" at which airport trucking is now, apparently, almost entirely mob-controlled. First, the Attorney General said, one local union slowly became dominant; it is controlled by elements connected with the organized criminal syndicate. Simultaneously, an air freight trucking organization was organized, and it became incorporated into a larger trucking organization. Then, organized crime figures appeared as consultants to the trucking organization, and the organization consolidated its hold on the business. Truckers who do not belong to this association "find themselves the victims of sabotage and constant labor problems with their unions," the Attorney General said. "They find it difficult to obtain business. Freight that is scheduled to be shipped on non-trucking association trucks has a curious habit of not arriving at all or arriving badly damaged."

Now, the Attorney General said, there is evidence that organized crime has spread to airline terminal operations. He told of the smooth disposition, on the European black market, of a large shipment of specialized antibiotics that was stolen from the terminal. Only organized crime "has

the facilities to dispose of such hot goods," the Attorney General pointed out.

"Thus, organized crime not only steals but provides a smooth system through which goods stolen by an independent thief can be disposed of.

"The total picture at this particular airport amounts to this: organized crime exacts a tariff on the trucker, a tariff on the truck driver, a tariff on the airline, a tariff on the sender, on the recipient and indirectly on the eventual customer.

"It also underwriters thefts by providing a marketing system. Our investigations of this airport have resulted in several criminal cases and this investigation is continuing.

The trucking industry is particularly hard hit by organized crime, Mr. Mitchell said.

"Because of its activities in loan sharking, and because of the corruption in some unions, organized crime has forced otherwise unwilling laborers in the trucking industry to point out especially valuable shipments.

"Members of La Cosa Nostra who operate warehouses and their own trucking companies as fronts permit their facilities to be used for storage of stolen goods. Members of La Cosa Nostra often depend on their own hijacking operations for revenue to pay their Cosa Nostra dues."

Organized crime "is operating with a great deal of efficiency and profit" in securities transactions, the Attorney General added. In the first nine months of 1969, $45,000,000 in securities was lost or stolen from banks and brokerage houses.

"We are becoming more aware every day of how vulnerable securities are to organized crime. Recently, two men were arraigned here for the theft of over $2 million from a New York bank. Another prosecution is pending for the theft of stock warrants. Because of the volume of trans-

actions in securities, the possibility for organized crime exploitations are endless.

"But they are variations on the same theme. Utilizing bribes, or threats, or loansharked debts, the organized criminal makes a contact inside a securities house.

"He then activates his wide-spread and rather sophisticated marketing structure in order to dispose of the stolen goods.

"But we too are becoming more imaginative every day in attempting to deal with this problem.

"For example, quite recently our undercover agents were able to make contact with an organized crime middleman. He claimed he had almost a million dollars in Treasury bonds and other securities stolen from a New York brokerage house.

"One morning last August, our New York Strike Force was able to arrange a meeting with the middleman who insisted on seeing at least $130,000 in cash or checks. While we could have arrested the middleman at that time, we were anxious to recover the securities and find the principals.

"At noon our Strike Force contacted the securities house from which the bonds were stolen. The securities house consulted the New York Stock Exchange. By 2 P.M., we had cashier's checks totaling $130,000. We brought the checks to the middleman who produced some of the stolen bonds. This arrest gave us a lead to an organized racketeer who was subsequently arrested and charged with participating in counterfeiting in another city.

"We are now negotiating with the New York Stock Exchange to set up a permanent fund of about $250,000. We plan to use the fund as front money in undercover purchases of stolen securities. As in the original case I cited, we do not expect that any of the money will ever be lost, although there is a remote possibility that something could go wrong."

The Justice Department is also initiating "lightening fast inspection of banks which we suspect may have dealings in stolen securities."

When it does move into the area of big business, the Attorney General pointed out, "organized crime has a big competitive advantage because it utilizes physical intimidation, political corruption, blackmail and bribery as standard operating procedures."

The Attorney General then pointed to the Justice Department's "major campaign to eliminate organized crime." He noted that highly trained strike forces have been dispatched throughout the nation.

"These are special teams of Justice Department lawyers and agents from other federal agencies whose orders are to concentrate on breaking the back of the criminal syndicate.

"They select the known members of an organized crime family and they investigate them for possible violations of tax laws, mail fraud laws, conspiracy laws, and the whole network of federal criminal statutes.

"We are also hoping to develop some new weapons. There is a proposed bill, just passed by the Senate, which utilizes civil remedies to attack organized crime.

"This bill would permit us to order forfeiture of property owned by an organized criminal. It would permit us to require dissolution of his business and would empower the courts to enjoin him from ever again entering that sort of business.

"We can jail an organized racketeer, but generally another comes to replace him. I think you can appreciate how much damage we could do if we could seize his trucking firm, if we could force him to forfeit his warehouse and if we could destroy his contacts by barring him from a certain type of business."

Mr. Mitchell concluded, "Some persons have argued that these extraordinary measures are in some way unfair:

That we are persecuting the Mafia. My view is that the business community, which is being victimized by organized crime, has a right to demand that the government counterattack. For too many years, the government's effort, though well-meaning, was understaffed and underfunded.

"Now we are striking back. Our indictments against organized criminals last year were 20 percent over the year before. And most of our Strike Forces are just getting started."

EXHIBIT D

Excerpt from New York Daily News of February 12, 1970.

DAILY NEWS, THURSDAY, FEBRUARY 12, 1970

HALF-TOLD TALE

Attorney General John Mitchell told a gathering in New York on Tuesday night that organized crime has obtained an armlock on cargo operations at "a rather large" airport by gaining control of the drivers' union and trucking association serving the terminal.

Mitchell didn't name the field, but there is general agreement he referred to Kennedy International.

John Mitchell

In effect, the attorney general had accused the Port Authority, local law enforcement officials, and even his own men in the area of snoring at the switch — or worse — while racketeering parasites fastened themselves on this multi-million-dollar operation.

Mitchell can't let it drop there; he must put up or shut up.

Labor racketeering, extortion and trade restraint are all federal crimes that fall in the bailiwick of Mitchell's Justice Department. If he has knowledge that local and state laws have been violated, he is obliged to cooperate with the officials concerned instead of using his information for titillating after-dinner talk.

Such half-told tales are irresponsible regardless of the source. Coming from the nation's chief law enforcement officer, this one is inexcusable.

EXHIBIT E

Excerpt from New York Daily News of February 12, 1970.

DAILY NEWS, THURSDAY, FEBRUARY 12, 1970

Denies Airport Crime Rap

EXHIBIT F

Excerpt from New York Daily News of February 13, 1970.

DAILY NEWS, FRIDAY, FEBRUARY 13, 1970

A Federal Attorney Inspects Kennedy

By GERALD KEESLER

Security measures at Kennedy Airport were given a first-hand check by the Brooklyn United States attorney here yesterday two days after U.S. Attorney General Mitchell said that organized crime had taken over the operations of one of the nation's largest airports.

U.S. Attorney Edward R. Neaher, in charge of the Eastern District which encompasses Brooklyn, Queens, and Long Island, met for more than three hours with top law enforcement representatives in charge of security at Kennedy Airport. Following the meeting Neaher inspected airport facilities.

At the meeting were top representatives of the Queens district attorney's office, FBI agents and Post Office, Immigration, Customs, Port Authority and city police. The meeting was a regular monthly get-together of the JFK Law Enforcement Advisory Group.

Neaher denied there was any connection between his attendance and the speech of his boss last Tuesday. As the top prosecutor of the Eastern District, he showed up to be briefed on security measures there, he said.

Following the meeting, Queens DA Thomas Mackell said the Mafia does not have "a stranglehold at Kennedy Airport," but then added that there were some "sensitive areas that we are looking into at the moment." He would not elaborate.

App. 12

EXHIBIT G

Daily News- Feb. 13, 1970

SHUT HIS MOUTH, ATTY. GEN. MITCHELL

VOICE OF THE PEOPLE

EXHIBIT H

DAILY NEWS, MONDAY, APRIL 27, 1970

QUIT STALLING! PASS THAT BILL!

VOICE OF THE PEOPLE

EXHIBIT I

Excerpt from New York Daily News of April 27, 1970.

DAILY NEWS, MONDAY, APRIL 27, 1970

GOV. CAHILL, PLEASE NOTE

The New York Legislature, shortly before it adjourned the other day, passed a bill to expand the Waterfront Commission by making it the Waterfront and Airport Commission and empowering it to hire police to combat wholesale larceny at the Kennedy, LaGuardia and Newark airports.

An identical bill is before the New Jersey Legislature, whose concurrence with New York's is required before the two-state commission can be thus enlarged and strengthened.

At Trenton, the measure has run afoul of the Air Transport Association's lobbyists, who are trying to kill it in committee on pleas that the reform would be unfair, too expensive, too complicated, and blah blah blah.

In this instance, we are convinced that the generally solid and responsible ATA is wrong. Hence, we think it is Gov. William Cahill's plain duty to throw his great weight behind the bill—and here's luck, governor.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1335

JAMES BUTTS AND JOHN S. GIANAKOS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a joint trial by jury in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to violate 18 U.S.C. 659 by attempting to dispose of a valuable oil painting stolen from the Pan American Terminal in the John F. Kennedy Airport in New York. (Pet. 3). Each petitioner was sentenced to two years imprisonment, sentence suspended except for two months to be served and twenty months probation. The court of appeals affirmed without opinion on January 5, 1971 (Pet. App. 2, Ex. B). The petition for a writ of certiorari, filed on February 10, is out of time under Rule 22(2).

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Petitioners do not challenge the sufficiency of the evidence to support their convictions. In brief, the evidence showed that the painting was stolen by employees of Pan American who then endeavored to find a buyer. Petitioner Butts, who lived in Baltimore, was one of those approached. He acted as a "finder" in an attempt to dispose of the stolen painting. Petitioner John S. Gianakos handled the negotiations between the various parties in the attempt to sell the painting. One of the persons approached notified the F.B.I., after which an F.B.I. agent posed as a buyer. The negotiations with the "buyer", the recovery of the painting and the arrest of most of the conspirators took place in New York.

1. Both petitioners argue that they could not have a fair trial in the Southern District of New York because of pre-trial publicity generated by a speech made by the Attorney General some two months prior to trial to the effect that organized crime was infiltrating legitimate business, including airport trucking and air line terminal operations at a rather large airport (Pet. App. 4–8). The newspaper articles submitted by petitioner either criticized the Attorney General's speech or denied the existence of the mass criminality referred to in the speech (Pet. App. 9–12). At trial petitioners also referred to an article and cartoon urging that the New Jersey legislature expand the powers of the Waterfront Commission (Pet. App. 13). We submit that none of this generalized discussion was likely to deprive petitioners of the right to a fair trial.

2. Petitioner Butts claims (Pet. 9) that his motion for a severance should have been granted, presumably because he lived in Baltimore and did not know all the co-defendants. Butts' claim that his defense was prejudiced by his joinder with the other defendants is unsupported by facts. Since he entered into a venture which he knew to be illegal, he was properly tried with his co-conspirators, whether or not he knew the identity of each. *Blumenthal* v. *United States*, 332 U.S. 539, 557–558.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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